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THE INDIVIDUAL EMPLOYMENT CONTRACT UNDER THE WAGNER ACT: II

HEINRICH HOENIGER†

V. *The Irregular Employee Status**

THE irregular employee status refers to anomalous conditions of affairs in industrial relations. Individuals who actually are not working are nevertheless considered employees. Three types of this status have already been distinguished:¹ (1) The employees might have been hired and out of work because of a labor dispute without any unfair labor practice of the employer (constructive not remediable status), (2) the employees might have been hired and out of work because of unfair labor practice (constructive remediable status), or (3) finally, they might not have been hired at all and nevertheless considered as employees because unfair labor practice might have already interfered with and hindered their hiring (quasi-employee status).

The irregular employee status in all its three phases is of enormous importance in labor relations. It is through the first type of this status that the right to strike obtains its momentum. The worker can go on strike without losing his job since he is retaining his employee status. The second and the third phases of this status which involve unfair labor practice are remediable. In actual practice the remedies in question are the teeth in the law. They constitute the sanctions against unfair labor practice. The exposition of the irregular employee status is, therefore, not a purely academic discussion. It is a topic of exceedingly practical significance. Clarification of the remediable types of the irregular employee status means nothing else than showing forth the *scope and efficacy of the sanctions against unfair labor practices*.

Constitutionality

All three types of this status have one factor in common. In all

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* The preceding installment of this article appears in 10 *FORDHAM L. REV.* 14, which covered the following sections: I *Individual Employment Contract and Individual Bargain*; II *The Individual Bargain*; III *Individual Employment Contract and Employment Contract and Employment Status*; IV *The Regular Employee Status*.

1. Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 *FORDHAM L. REV.* 14, 33, 34.

of them the right of the employer to discharge and select workers is restricted through statutory² provisions, especially through the Wagner Act. As easily could be foreseen, these statutory restrictions had to be tested with regard to their constitutionality. It was argued that they violate freedom of contract. The U. S. Supreme Court, however, rejected this objection.³ It recognized the validity of the statutory provisions in question, in a series of decisions, and very recently, it approved the most contested case of the quasi-employee status.

The earliest decisions, in April 1937, refer to the remedial phase of the constructive employee status. The two remedies which exert the most trenchant influence upon the employer's right to select and discharge were considered to be constitutional. Freedom of contract was held⁴ not to be impaired by reinstatement and back-pay orders, so widely used in cases of unfair labor practice.

In May 1938, in *NLRB v. Mackay Radio and Telegraph Co.*,⁵ the Supreme Court clarified the constitutionality of the provision of the Wagner Act, that strikers retain their employee status and remain protected against the unfair labor practices denounced by the Act. Through this decision the non-remediable phase of the constructive employee status is recognized. In these two cases of the constructive employee status the employment relations were originally established through individual contracts of hiring; they are simply protracted by the operation of law over periods during which the constructive employees are actually out of work. In contrast to these two phases, in the third phase, the

2. These statutory restrictions are to be distinguished from those which are voluntarily entered into through collective agreements. As mentioned above, these latter kind of restrictions are not to be dealt with in this article.

3. It should be noted that the U. S. Supreme Court presented its basic view on the principle of freedom of contract and the power of Congress under the Constitution to restrict such freedom of contract in *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 as well as in *West Coast Hotel Co. v. Ernest Parish et al.*, 300 U. S. 379. Both these decisions were handed down on March 29, 1937, that is, only two weeks prior to the earliest decisions concerning the NLRA (*infra* note 4) which were handed down on April 12, 1937.

4. *NLRB v. Jones & Loughlin Steel Corp.*, 301 U. S. 1, 45, 47 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937); *NLRB v. Friedman-Harry Marks*, 301 U. S. 58, 81 (1937).

5. "Congress may impose upon contractual relations reasonable regulations calculated to protect commerce against threatened industrial strife. . . . The provision of the Act continuing the relationship of the employer and employee . . . is a regulation of the same sort . . ." and does not interfere with the usual exercise of the right of the employer to select and discharge its employees. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347, 348 (1938).

quasi-employee has never been hired through an individual contract. There is no question of extending already existing employment relations and of putting back to work men who were for a certain period out of work. There is no question of *reinstatement*. In this status outsiders are to be "instated", *i.e.* treated as if they were hired although they were actually refused employment.⁶ The question is: May the NLRB order employment with back-pay of persons—not employees as defined by the Wagner Act—who have been refused jobs because of their union membership or activity? If the Board is empowered to do so, then orders of this kind establish the quasi-employee status. This question was highly disputed, and opposing views were held by the courts of appeal.⁷ The NLRB has continued to issue such "instatement" orders.⁸ The U. S. Supreme Court has very recently approved of the Board's practice in *Phelps Dodge Corp. v. NLRB*,⁹ and thus confirmed the quasi-employee status.

The exposition of the entire scheme of the irregular employee status requires discussion of complicated problems and a variety of phases. It will be discussed in the following order: first, the conditions creating the three different phases of the status; second, the implications of this status; third, its termination. Because the problem of the termination of the irregular status is shrouded in confusion a fourth subdivision is necessary. Solution thereof may be found under the guidance of recent decisions of the Supreme Court by discerning the private law and the public law aspect in employment relations.

1. *Conditions Creating the Irregular Status*

The three types of the irregular employee status require different presuppositions.

1. The non-remediable phase of this status is present if an individual ceases to work "as a consequence of, or in connection with any current labor dispute"¹⁰ and when no unfair labor practice of the employer is involved. The term "labor dispute" is defined by the Act as:

6. The term "instatement" has recently been used by writers. See 7 L.R.R. 459 (1941) with respect to *NLRB v. Waumbec Mills*, 114 F. (2d) 226 (C. C. A. 1st, 1940).

7. The "instatement" order of the NLRB was sustained and ordered to be enforced in *NLRB v. Waumbec Mills, Inc.*, 114 F. (2d) 226 (C. C. A. 1st, 1940). On the other hand, it was refused enforcement in *NLRB v. National Casket Co.*, 107 F. (2d) 992 (C. C. A. 2d, 1939) and *Phelps Dodge Corp. v. NLRB*, 113 F. (2d) 202 (C. C. A. 2d, 1940).

8. *Nevada Consolidated Copper Corp.*, 26 NLRB No. 113 (1940). See note 37 *infra*.

9. *Phelps Dodge Corp. v. NLRB*, 113 F. (2d) 202 (C. C. A. 2d, 1940) 312 U. S. 669 (1941).

10. NLRA No. 2 (3), 29 U. S. C. A. No. 152 (3). See Hoeniger, *op. cit. supra* note 1, at 31.

"including any controversy concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."¹¹

This definition dispels doubts which have arisen with respect to other statutes.¹² These doubts center around the problem whether "labor dispute" is to be construed to mean only disputes concerning those between whom the proximate relationship had already existed and was temporarily interrupted by the dispute.¹³ Moreover, in the cases which are to be scrutinized here, the cessation of work affects doubtlessly the immediate relation between employer and employees. Therefore, this particular type of the crucial questions with respect to the problem of labor disputes does not come up in this connection. Other problems, however, remain to be solved, particularly the question arising, when a stoppage of work ceases to be a "current" labor dispute. We may say that this is the case if the places of employees out of work are filled and normal production is going on.¹⁴ The question, however, still remains: To what extent can strikers and other irregular employees out of work be replaced? Such replacement, if possible, would terminate their employee status. The whole question of replacement will, therefore, fittingly be discussed in connection with the question of the termination of the irregular status. The practical importance of this question is obvious.

The second characteristic of the non-remedial phase of the irregular status is *the absence of unfair labor practice*. This in turn is the reason why no remedies are provided by the NLRA. Consequently the Board has no jurisdiction over the employer in these cases,¹⁵ at least, so far as

11. NLRA No. 2 (9), 29 U. S. C. A. No. 152 (9).

12. For instance with regard to the Sherman Act, Clayton Act, Norris-La Guardia Act No. 13. However, even these doubts have been considerably reduced recently through the decision of the Supreme Court in *U. S. v. Hutcheson* 61 Sup. Ct. 463 (1941).

13. See JAEGER, *CASES AND STATUTES ON LABOR LAW* (1939) 233 headnote; MARIANO, *THE WAGNER ACT* (1940) 95-152; SHARP AND GREGORY, *SOCIAL CHANGE AND LABOR LAW* (1939) 137-145; Van Dusen, *The Progress of Labor Law* (1939) 14 TEMP. L. Q. 1; Etter, *Statutory Definitions of "Labor Dispute"* (1938) 19 ORE. L. REV. 81, 201; Hogan, *The Fifth Decade of Federal Legislation in the Field of Labor Disputes* (1939) 28 GEO. L. J. 343.

14. *Standard Lime & Stone Co.*, 17 NLRB 147 (1939); *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 Fed. 171, 187 (N. D. Ohio, 1919); *Quinlivan v. Dail-Overland Co.*, 274 Fed. 56, 65 (C. C. A. 6th, 1921); *Jeffrey-de Witt Insulator Co. v. NLRB*, 91 F. (2d) 134, 138 (C. C. A. 4th, 1937), *cert. denied*, 302 U. S. 731 (1937); *Standard Insulation Co. Inc.*, 22 NLRB No. 46 (1940).

15. *Black Diamond S. S. Co. v. NLRB*, 94 F. (2d) 875, 879 (C. C. A. 2d, 1938), *cert. denied*, 304 U. S. 579 (1939). Note (1939) 39 COL. L. REV. 1369, 1370, n. 11.

prevention of unfair labor practices as provided in section 10 of the NLRA is concerned. On the other hand, the Board is empowered as well as compelled to pass judgment on this status in representation and election cases. It has to determine whether and to what extent irregular employees of the non-remediable type of this status are eligible to vote in elections, and has done so in numerous instances.¹⁶

The third element on which the non-remedial phase of the irregular employee status is conditioned is also a negative one. It derives from definition of the term "employee" in Section 2 (3) of the NLRA.¹⁷ This definition excepts such individuals who are out of work from the irregular employee status "who have obtained any other regular and substantially equivalent employment." What we are to understand by "regular and substantially equivalent employment" is to a large extent already clarified in litigation¹⁸ in determining the equivalence of the new employment, present working conditions at the plant of the former employee are to be taken into account rather than those existing at the cessation of work.¹⁹

Until very recent times, this negative element of *absence of any equivalent employment* was often considered to be a common prerequisite of the three different phases of the irregular employee status. In other words, the two remediable types of the irregular status were often thought to be conditioned also upon the fact that the irregular employee in question had not obtained any other equivalent employment at the time of the beginning of the procedure concerning prevention of unfair labor practices. The decision of the Supreme Court in *Phelps Dodge Corp. v. NLRB*,²⁰ has clarified this issue. Absence of any other equivalent employment is an indispensable prerequisite only in the case of the non-remediable phase of the irregular status. The reasons for this are as follows: This phase of the status has as its legal basis only the employee—definition of the Act referred to above.²¹ This definition is to be

16. See Fifth Annual Report of the NLRB at 58 (1941).

17. See Hoeniger *op. cit. supra* note 1 at 31.

18. NLRB v. Carlisle Lumber Co., 99 F. (2d) 533, 538 (C. C. A. 9th, 1938), *cert. denied*, 306 U. S. 646 (1939); NLRB v. Botany Worsted Mills, 106 F. (2d) 263, 269 (C. C. A. 3d, 1939); Pulaski Veneer Corp., 10 NLRB 136, 154 (1938); Boss Mfg. Co., 11 NLRB 432, 440 (1938). For a discussion of what constitutes regular and substantially equivalent employment see ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* (1940) 548.

19. Mooresville Cotton Mills v. NLRB, 94 F. (2d) 61, 66 (C. C. A. 4th, 1938), 110 F. (2d) 179, 180 (C. C. A. 4th, 1940). The opposite opinion is held by the NLRB in Louisville Refining Co., 4 NLRB 844, 873 (1936); Keystone Freight Lines, 24 NLRB 128 (1940). *But see* dissenting opinion of Board Member Leiserson.

20. *Phelps Dodge Corp. v. NLRB*, 312 U. S. 669 (1941).

21. See note 17 *supra*.

applied as we have seen, particularly in representation and election cases, *i.e.*, in the operation of section 9 of the Act. There it becomes undoubtedly necessary to determine what employees of a certain employer form an appropriate bargaining unit and are eligible to vote or otherwise designate representatives for the purpose of collective bargaining. With regard to such representation employees out of work who have obtained regular and equivalent other employment cease to be "employees" in the sense of the Act. Conditions are different if unfair labor practice is involved. The power of the Board to order affirmative remedial action in case of unfair labor practice is derived from section 10 of the Act. Neither the phrasing nor the intrinsic purpose of these provisions necessarily limit remediable actions to those employees out of work who have not obtained regular and equivalent employment. It is in the discretionary power of the Board to determine whether or not, in a given case, the undoing of discrimination requires the reinstatement also of those employees out of work who have obtained such equivalent employment.

2. The second type of the irregular status is constituted by the two elements: first, that the individuals once had been hired and second that their work has ceased *because of unfair labor practice* of the employer.

The term *unfair labor practice* is defined by the Act itself²² and is clarified by a host of board and court decisions.²³ It is also clearly established that unfair labor practice may precede, accompany or succeed the cessation of work.²⁴ Furthermore, it does not matter whether the employee stops working of his own accord in the event of a strike because

22. NLRA Nos. 2 (8), 8, 29 U. S. C. A. Nos. 152 (8), 158.

23. See Third Annual Report of NLRB 58-104 (1939); Fourth Annual Report of NLRB 57-73 (1940); Fifth Annual Report of NLRB 32-53 (1941); Report of the New York State LRB for the period from July 1, 1937 to Dec. 31, 1939 39-92 (1940). For strikes caused by unfair labor practice, see *Foster Bros. Mfg. Co. v. NLRB*, 1 NLRB 880, 889 (1936), *rev'd*, 85 F. (2d) 984 (C. C. A. 4th, 1936); *Brown Shoe Co.*, 1 NLRB 803, 825 (1936); *Titan Metal Mfg. Co.*, 5 NLRB 577, 590-592 (1938); *Remington Rand v. NLRB*, 94 F. (2d) 862, 866 (C. C. A. 2d, 1938), *cert. denied*, 304 U. S. 576 (1938); *Jeffrey-de Witt Insulator Co. v. NLRB*, 91 F. (2d) 134 (C. C. A. 4th, 1937), 302 U. S. 731 (1937). For strikes prolonged by unfair labor practice see *Alaska Juneau Gold Mining Co.*, 2 NLRB 125, 127-132 (1936); *Black Diamond S. S. Co. v. NLRB*, 94 F. (2d) 875, 878 (C. C. A. 2d, 1938), *cert. denied*, 304 U. S. 579 (1938).

24. Note (1939) 39 COL. L. REV. 1369. For unfair labor practice preceding and accompanying cessation of work, see *Pacific Greyhound Lines*, 2 NLRB 431, 438 (1936), 91 F. (2d) 458, 459 (C. C. A. 9th, 1937), 303 U. S. 272, 274 (1938); *Globe Mail Service*, 2 NLRB 610, 616 (1937); *NLRB v. Remington Rand*, 2 NLRB 626, 632-646 (1937), 94 F. (2d) 862, 866 (C. C. A. 2d, 1938), 304 U. S. 590 (1938); *National Casket Co., Inc.*, 1 NLRB 963, 966 (1936), 12 NLRB 165 (1939). For unfair labor practice subsequent to cessation of work see *Alaska Juneau Gold Mining Co.*, 2 NLRB 125, 128 (1936).

of unfair labor practice or is forced to stop by the employer. Stoppage of work caused by the employer might take the permanent form of discharge of the individual lock-out²⁵ of a number of employees at the same time or it might be intruded only for a temporary period, the so-called lay-off or furlough.²⁶ In addition, employees are considered to be out of work in consequence of unfair labor practice when they have ceased working as a means of protesting against discriminatory demotion²⁷ which result in work under adverse conditions such as lower wages, or merely temporary employment, or labor entailing more peril to life. The same is true with regard to employees who ceased working because of the employer's failure to provide protection against assault and eviction by an anti-union faction of employees. When they ceased working they lost their job in consequence of unfair labor practice.²⁸

The remediable constructive employee status will be obtained: first, by employees who go on strike, are locked out or laid off because of unfair labor practice; secondly, by those who are discriminatorily discharged; and thirdly, by those who cease working because of discriminatory demotion or similar kind of unfair labor practice. It is clear that discharge is not a requisite of discrimination.²⁹

25. *S. L. Allen & Co., Inc.*, 1 NLRB 714, 722 (1936); *Canvas Glove Mfg. Works, Inc.*, 1 NLRB 519, 525 (1936); *NLRB v. Lund*, 103 F. (2d) 815, 818 (C. C. A. 8th, 1939).

26. See *NLRB v. Pennsylvania Greyhound Lines*, 1 NLRB 1, 36 (1935), *aff'd*, 91 F. (2d) 178 (C. C. A. 3d, 1937), 303 U. S. 261 (1938); *NLRB v. Friedman-Harry Marks Clothing Co.*, 1 NLRB 411, 428 (1936), *rev'd*, 85 F. (2d) 1 (C. C. A. 2d, 1936), but *aff'd* 301 U. S. 58 (1937).

27. *Harlan Fuel Co.*, 8 NLRB 25 (1938) (transfer amounting to discharge, where an employee was transferred from his position as trackman, and then assigned an unsafe working place); *Clover Fork Coal Co. v. NLRB*, 97 F. (2d) 331 (C. C. A. 6th, 1938) (transfer to work under adverse conditions which would result in loss of pay); *R. C. Hoiles*, 13 NLRB 1122 (1939) (employee who was in charge of the composing room was transferred to the status of a printer); *Waggoner Refining Co., Inc.*, 6 NLRB 731 (1938) (employee who had charge of the treating and loading work was demoted to yard labor); *The Press Co., Inc., et al.*, 13 NLRB 630 (1939) (every able feature-story writer was demoted from handling important news stories to routine work on obituaries). Order of the Board modified rehearing denied, *The Press Co. et al. v. NLRB*, 118 F. (2d) 937 (1941).

28. *Mooreville Cotton Mills v. NLRB*, 94 F. (2d) 61, 66 (C. C. A. 4th, 1938); *NLRB v. American Potash & Chemical Corp.*, 98 F. (2d) 488, 493, 494 (C. C. A. 9th, 1938).

29. *NLRB v. Star Pub. Co.*, 97 F. (2d) 465, 470 (C. C. A. 9th, 1938). Since discharge is not a requisite of discrimination, the term "implied" or "constructive" discharge does not expedite the current analysis of the cases in question. This term was introduced by Professor Chester C. Ward. Ward, *"Discrimination" Under The National Labor Relations Act* (1939) 48 *YALE L. J.* 1152, and adopted by ROSENFARB, *op. cit. supra* note 18, at 144. It rather beclouds the fact that it is the unfair labor practice causing either the cessation of work or the hiring and not the formal act of discharge which creates the remediable types

By whatever means unfair labor practice may have been committed against employees who are now out of work, the Wagner Act provides remedies in each of these cases. These remedies vary from mere reinstatement without any back-pay to reinstatement with back-pay either in part or in full. The Board directs back-pay only to irregular employees who are discriminated against, and patterns in each case the back-pay order to the circumstances of the case. Unfair labor practice may be committed, *e.g.* by refusal of the employer to bargain collectively in good faith without any interference with the right to organize or any other kind of discrimination. In ordinary situations of this character the Board directs only reinstatement. The Board has summarized the principle established by its orders as follows:

"Unlike employees who have been discriminatorily discharged, however, strikers are awarded back pay only from the date of their application for reinstatement pursuant to the Board's order to the date upon which the employer complies with its terms by offering them reinstatement, or, if so ordered, by placing them on a preferential list for employment when it becomes available."³⁰

The basic reason for this policy established by the Board is to be found in the intent of the Act. It was designed to furnish an alternative to the use of self-help by employees against the employer not willing to bargain collectively in good faith. While the right to strike is not impaired, employees whose employer refuses to bargain shall be induced to come to the Board for relief rather than go out on strike. Such conduct would hardly be encouraged by giving back-pay to strikers who were not discriminated against, even where a strike was caused by an unfair labor practice. This principle developed and adhered to by the Board actually affectuates the basic policy of the Act of "encouraging practices fundamental to the friendly adjustment of industrial disputes."³¹

3. The third phase of the irregular status—the quasi-employee status—is based on the following facts and considerations: Encouragement or discouragement of membership in a labor organization may occur through discrimination at the very threshold of the employment relationship.

of the irregular employee status. The remedies of the NLRA are directed against the unfair labor practice and not against one single expression of this attitude such as discriminatory discharge. NLRA § 10, 29 U. S. C. A. § 160. Otherwise the Board's practice to order reinstatement not only in cases when unfair labor practice caused the employee to abandon his job, but even in cases where the employee did not even start to work, because unfair labor practice prevented his being hired, would be hardly understandable.

30. Third Annual Report of NLRB 210 (1939); see Fourth Annual Report of NLRB 105 (1940).

31. NLRA § 1; 29 U. S. C. A. § 151.

Then, the door to employment is closed through such discrimination. This applies to strangers who had never before been hired by the employer or to individuals who had been employed at some prior time, but not at the time of application. Such practice is as dangerous to the aims of the Act as discriminatory discharge.

"A discriminatory refusal to hire is as coercive as a discriminatory discharge."³²

Therefore, the remedies provided by the Act against unfair labor practice have been applied by the Board in these cases. This practice of the Board has now been confirmed by the Supreme Court in *Phelps Dodge Corp. v. NLRB*.³³

Section 8 (3) of the Wagner Act in forbidding discrimination in employment is not limited to those who are employees at the time of the discrimination. It forbids explicitly discrimination "in regard to hire."³⁴ Therefore, the practice of the Board seems to be well founded on the letter as well as the spirit of the law.³⁵

The Board has summarized its position by saying "that the Act protects workers against the notorious anti-union blacklist."³⁶ Consequently the Board has ordered not only "instatement" with back-pay to applicants for jobs who were discriminatorily rejected, but also to those workers who did not even apply for employment because they were informed that their names appeared on the employer's blacklist.³⁷ This practice, if confirmed by the courts, may give the quasi-employee status an importance, the full extent of which can hardly be foreseen. Perhaps, this practice may prove to be an effective weapon against blacklisting, perhaps a more effective one than the various statutes which have been directed against

32. *NLRB v. Waumbec Mills*, 114 F. (2d) 226 (C. C. A. 1st, 1940).

33. *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941).

34. ROSENFARB, *op. cit. supra*, note 18, at 545. *Algonquin Printing Co.*, 1 NLRB 264, 269 (1936); *Montgomery Ward & Co.*, 4 NLRB 1151, 1166 (1938), 9 NLRB 538, 545-552 (1938) (employee refused employment as an "extra"); *Kelly Springfield Tire Co.*, 6 NLRB 325, 330-338 (1938); *Knoxville Pub. Co.*, 12 NLRB 1209, 1222 (1939); *Mountain City Mills Co.*, 25 NLRB 56 (1940). Strikers who by unfair labor practice are prevented from being rehired are protected by the same remedies as other new or former employees applying for a job. *Sunshine Hosiery Mills*, 1 NLRB 664, 673 (1936); *NLRB v. Lightner Pub. Corp. of Illinois*, 113 F. (2d) 621 (C. C. A. 7th, 1940).

35. See however the dissenting opinion of Stone J., concurred in by Hughes, C. J. in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941).

36. Fifth Annual Report of NLRB 39 (1941).

37. *Nevada Consolidated Copper Corp.*, 26 NLRB No. 113 (1940), *rev'd*, — Fed. (2d) — (C. C. A. 10th, 1941) (the court found the employees, whom the Board directed to be instated, guilty of sabotage). See note 8 *supra*.

it with little success.³⁸ According to this practice, every worker who is black-listed acquired the quasi-employee status if he can prove that this blacklisting caused him not to apply for employment. Moreover, the fact that he has obtained equivalent employment does not necessarily prevent the Board from directing his instatement with back-pay subject to certain deductions. In *Phelps Dodge Corp. v. NLRB* the Supreme Court has stated:

"The mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrimination has been found. A statute expressive of such large policy as that on which the NLRB is based must be broadly phrased and carries with it the task of administrative application."³⁹

Therefore, it is in the discretionary administrative power of the NLRB to determine under what circumstances and to what extent the fact of having obtained equivalent employment may or may not terminate the remediable irregular status of the employee in question. Furthermore, the back-pay remedy is entrusted to the Board's discretion so that deductions may be made not only for the actual earnings by the worker, but also for what he failed without excuse to earn. As the Supreme Court states,

"the discretion of the Board is wide enough to keep speculative claims for deductions within reasonable bounds through flexible procedural devices."⁴⁰

II. *Implications of the Irregular Status*

After the exposition of the conditions necessary to create the three types of the irregular employee status the question posits itself: What is the purpose of this status with its three phases? What are its implications? What features distinguish the status of employees out of work from the regular case?

Four main features characterize the irregular status: (1) Some of the rights of the employees, although preserved, become dormant so that they revive only in case of reinstatement. (2) The irregular employees

38. DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY*, (5th ed. 1941) 922; MC-NAUGHTON, *THE DEVELOPMENT OF LABOR RELATIONS LAW*, (1941) 26; 179-180.

39. *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941).

40. It is not within the limits of this article to discuss explicitly the numerous formulas through which the Board tries to pattern its back-pay orders to the circumstances of the various cases. Nor is it intended to discuss fully the significance of the decision in *Phelps Dodge Corp. v. NLRB*. Its bearing upon the development of the public administrative law can hardly be overestimated. See note 94 *infra*.

remain members of the bargaining unit, eligible to vote for representation and protected against unfair labor practice. (3) On the other hand, the irregular status is devoid of substance compared with the regular status. (4) It is less flexible with regard to the possibility of its dissolution by discharge than the regular status.

1. Since the individuals out of work are held to be employees, some of the rights acquired by them through collective agreements or individual contracts of hiring remain preserved and intact although they become ineffective or dormant for the time being. For instance such rights as seniority rights,⁴¹ rights under an insurance policy,⁴² or to an interim wage increase,⁴³ or vacation,⁴⁴ revive in case of reinstatement.

2. As employees they are entitled to protection by the provisions of the Wagner Act. They are safeguarded in the enjoyment of these rights. It does not matter whether they were ousted by the employer or quit the employment voluntarily as a result of unfair labor practice. A case of the second type is present in *NLRB v. Mackay Radio & Telegraph Co.*, where the U. S. Supreme Court held:

" . . . their action is not to be construed as a renunciation of the employment relation . . . " and " . . . they remain employees for the remedial purposes specified in the Act and protected against the unfair labor practices denounced by it."⁴⁵

Protection against unfair labor practice includes protection of strikers against the consequences of unfair labor practice occurring after the commencement of the strike. They retain their vote in employee elections.⁴⁶ The employer is not relieved of his duty to bargain collectively with their representatives.⁴⁷

41. *Crystal Springs Finishing Co.*, 12 NLRB 1291, 1305 (1939).

42. *Continental Oil Co.*, 12 NLRB 789, 825 (1939).

43. *Pioneer Pearl Button Co.*, 1 NLRB 837, 840, 846 (1936).

44. *Valley Mould & Iron Co.*, 20 NLRB 18 (1940) *aff'd* *Valley Mould & Iron Co. v. NLRB*, 116 F. (2d) 760 (C. C. A. 7th, 1940). See also in respect of freedom of molestation, *General Shoe Corp.*, 5 NLRB 1005, 1020 (1938); *Ashville Hosiery Co.*, 11 NLRB 1365, 1380 (1939).

45. *NLRB v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 347, 345 (1938), (*italics mine*). See note 24 *supra*.

46. *Harris Hub Bed & Spring Co.*, 13 NLRB 1236 (1939); *Seiss Mfg. Co.*, 7 NLRB 481, 484 (1938); *Piedmont Granite Quarries*, 8 NLRB 1202, 1207 (1938); *R. C. A. Mfg. Co.*, 2 NLRB 159, 165 (1936); *Saxon Mills*, 1 NLRB 153, 156 (1936); *Williams Mfg. Co.*, 6 NLRB 135, 151 (1938); *Carrolton Metal Products*, 6 NLRB 569, 588 (1938); *Crucible Steel Co.*, 1 NLRB 545 (1936); *Burton Dixie Corp.*, 29 NLRB No. 86 (1941).

47. "To hold otherwise for the purpose of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached

3. The fact that these individuals are out of work entails peculiar factual and legal effects which distinguish markedly the irregular from the regular employee status. Individuals who do not work, although they retain the constructive employee status, are not subject to legal implications which result from the actual rendition of services. The integration into the business organization is loosened. Because the irregular employee is actually not working, he is not any longer subject to the continuing authority of the employer to direct and supervise the rendition of work. The employer's authority to direct the rendition of services is suspended until the employee begins working again. In the meantime, the actual and factual rights and duties which are the core of the employment relations in the case of employees at work, are suspended. To a considerable extent the irregular employee's status is devoid of substance.

4. The lack of actual performance of work has still another consequence. The normal right of the employer to discharge has no normal occasion for its exercise. The employees are not working, and,

"hence the myriads of reasons for the discharge, such as inefficiency, lateness, infraction of rules etc. are not available. Neither is the employer in a position to exercise his legal whim to dismiss an employee because of the color of his hair. . . ." ⁴⁸

On the other hand, in the regular case when the employee is at work, the employer is free

"to hire or discharge, to promote or demote, to transfer, lay-off or reinstate, or other wise to affect the hire or tenure of employees or their terms or conditions of employment, for asserted reasons of business, animosity, or because of sheer caprice, so long as the employer's conduct is not wholly or in part motivated by anti-union cause" ⁴⁹

and so long as such action would not violate any collective agreement. These rules do not apply to the irregular employee status, which must be protected against wanton dissolution. If brought about by unfair labor practice, the remedies provided by the NLRA to protect constructive and quasi-employees could never serve the purpose of the Act, if their factual

a critical stage." Sen. Rep. No. 573, 74th Cong., 1st Sess. (1941) p. 6. See summary in Fifth Annual Report of the NLRB 58 (1941).

48. ROSENFARB, *op. cit. supra* note 18 at 560.

49. Principles established by NLRB. Third Annual Report of the NLRB 65 (1939); Fourth Annual Report of NLRB 60 (1940); Fifth Annual Report of NLRB 37 (1941). "In discharging the employees . . . their status as employees was destroyed, so as to exclude them from the protective operation of the Act." *C. G. Conn Ltd. v. NLRB*, 108 F. (2d) 390, 396, 398 (C. C. A. 7th, 1939) wherein employees were discharged previous to any unfair labor practice or labor dispute.

basis, the status itself, could be destroyed arbitrarily. What would become of the right "to engage in concerted activities" which is guaranteed in Sec. 7 of the NLRA, if the striker could be dismissed without any cause?⁵⁰ It is one of the great and new achievements of the Wagner Act that it preserves for the individual out of work because of unfair labor practice or a labor dispute his standing as an employee. This achievement should not be frustrated by the unilateral action of the employer. Therefore his right of discharge must be restricted. So must be the right to select.⁵¹ Because of these restrictions in discharging, the irregular employee status becomes more rigid than the regular one. It is less flexible as to the possibility of its dissolution by discharge. The nature and extent of these restrictions will be more fully discussed in the following inquiry into the ways to alter and end the irregular employee status.

III. *Termination of the Irregular Status*

Such an anomalous situation as the irregular employee status is 'not designed to last. First of all, there is nothing in the Wagner Act which hinders employees, ousted from their work by unfair labor practice or out of work because of a labor dispute, from refusing to return to work and from abandoning their jobs voluntarily.⁵² In doing so the employees concerned may end their irregular employee status by their own free choice. It is, however, the other side of the coin which causes difficulties. The employer patently has not the same free choice to terminate the irregular employee status through discharge. What restrictions are imposed upon the employer's right to dissolve the employment relationship in the case of the irregular status? Deduced from all that has been said before one point can be stated with certainty: if dischargeable at all, the irregular employee can be discharged only for particular cause. It seems, moreover, that the same causes or, at least, approximately the same causes limit the discretionary power of the Board to order reinstatement.⁵³

50. *Sunshine Hosiery Mills*, 1 NLRB 664, 672, 675 (1936); *C. G. Conn Ltd.*, 10 NLRB 498, 513 (1938). "Without this assurance of the continued protection of the Act, the striking employee would be quickly put beyond the pale of its protection by discharge," dissenting opinion of Reed, J. in *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 266 (1939).

51. "From the date of the respondent's first unfair practice, its ordinary right to select its employees became vulnerable," *Black Diamond S. S. Corp. v. NLRB*, 94 F. (2d) 875, 879 (C. C. A. 2d, 1938), *cert. denied*, 304 U. S. 579 (1938).

52. "There is no basis in the Wagner Act for the Board to compel an employer to take back employees who have voluntarily refused to return to their jobs being temporarily laid off for cause. . . ." *NLRB v. Bradford Dyeing Ass'n*, 106 F. (2d) 119, 124 (C. C. A. 1st, 1939).

53. See Hoeniger *op. cit. supra* note 1 at 33 note 74.

If there are facts which may justify discharge or denial of reinstatement, the entire situation becomes complicated. To the conditions creating this status a new element is added which encroaches upon the status so that the employee concerned may be deprived of the remedies or the protection against discharge. In these complicated cases, therefore, the irregularity of the status may come to an end because the status itself is terminated. There is no doubt that the irregular employee who is denied the right to be reinstated through a final decision ceases to be an employee at all. The same is true in the case of a valid discharge of an irregular employee.

In contradistinction to these complicated cases are those in which only the conditions creating the irregular status prevail and no deteriorating factor comes in. Therefore, the remedies provided by the Wagner Act are to be applied to their full extent. The chief remedy is reinstatement. The reinstated employee who is working again has converted his irregular status into the regular one. It goes without saying that he continues to be an employee. Only the irregularity of his status has been terminated.

The following scheme may serve to make perspicuous the discussion of the details concerning the termination of the irregular status.

The irregular employee status can be terminated:

(1) In the uncomplicated cases where there are no facts impairing the protective effect of this status: by application of the affirmative remedies of the Wagner Act such as reinstatement or "instatement."

(2) In the complicated cases where the irregular employee status is weakened by deteriorating factors in one or two ways, viz: a) by denial of a remedial order by the Board; b) by discharge of the employer.

This bifurcation of the ways of ending the deteriorated irregular employee status presents the third main point which has to be discussed. Many intricate cross relations appear to exist between these two seemingly different-ending causes of the deteriorated irregular status. The very same facts are considered under the double aspect of justifying either discharge or denial of the remedies provided by the Wagner Act. This viewing of the facts through, so to say, a bifocal lens causes much confusion. This in turn raises doubts as to the correctness of the bifurcated way of judging the facts. The attempt to find the path leading out of this confusion requires a survey of the seemingly distinct ending causes as they are viewed at present.

(1) The normal way of ending irregularity is to convert it into the regular state of affairs. Consequently, the NLRA tries to terminate the irregular status of the employees out of work by bringing them back to work and thus into the regular status of actually working employees.

The chief remedies for attaining this goal are orders of the NLRB to reinstate employees with or without back-pay.⁵⁴ These remedies can not be applied in an economic strike because of the absence of unfair labor practice. Moreover, in such a labor dispute the non-remediable employee status of strikers may be terminated by the employer exercising his right to *replace strikers*. In *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court stated:

"It does not follow from the Act that an employer, who has not committed unfair labor practice, has lost the right to protect his business by supplying places left vacant by strike."⁵⁵

If the replacement of the strikers was necessary for the continuation of the business, the employer will not be found to be engaging in unfair labor practice by failing to displace the newly hired workers.⁵⁶ In such a case, under the authority of the *Mackay* decision, the strikers concerned may be said to have lost the strike; the men who took their places remain; the strikers cease to be employees; their irregular status is terminated.

It must however be kept in mind that, by means of replacement, the employer can not terminate the non-remediable employee status arbitrarily; and especially not discriminatorily. On the other hand, replacements in order to insure the continued operation of a plant or a ship were considered to be sufficiently justified.⁵⁷ Moreover, when there remain vacancies it would constitute discrimination to refuse reinstatement to strikers because of their participation in the combined labor action.⁵⁸ In the past, whenever the circumstances indicated an intent to discriminate against the returning strikers, the Board tried to prevent recurrence of this discrimination in the future, by placing them on a preferential list.⁵⁹ Such preferential listing of non-discriminatorily-discharged employees was, however, held improper by the courts.⁶⁰

Even the employer, who is guilty of unfair labor practice, does not

54. Back pay is awarded only in cases of discrimination. Third Annual Report of the NLRB 210 (1939). See note 30 *supra*.

55. 304 U. S. 333, 345 (1938).

56. Fifth Annual Report of the NLRB 40 (1941). See *Calmar Steamship Corp.*, 22 NLRB No. 33 (1940).

57. *Ore Steamship Corp.*, 29 NLRB No. 137 (1931).

58. *Alaska Juneau Gold Mining Co.*, 2 NLRB No. 125, 139, 146 (1936); *Wilson and Co. Inc.*, 30 NLRB No. 51 (1941).

59. *American Mfg. Co.*, 7 NLRB 753, 764 (1938), and summary in Fourth Annual Report of the NLRB 108 (1940), under the heading: Precautionary Orders.

60. *NLRB v. Superior Tanning Co.*, 117 F. (2d) 881 (C. C. A. 7th, 1940); *cert. denied*, 61 Sup. Ct. 834; (the precautionary order was held invalid because punitive in character).

need to close down his plant. He may also replace the strikers by new employees. In this case, however, the Board may order reinstatement of strikers and displacement of those hired after the employer's unfair labor practice.⁶¹ Where after the dismissal of the newly hired workers full reinstatement of the irregular employees is impossible, *e.g.* because of curtailment of operations or closing down of certain departments, the situation is remedied in the following way: First the necessary reduction of the staff is to be made among the employees, the regular as well as the irregular, on a non-discriminatory basis in accordance with the prevailing system of seniority and other methods in force for reducing the staff. Second, those irregular employees for whom immediate reinstatement is not available are to be placed upon a preferential list and offered employment as it becomes available, before other workers are hired.⁶² The irregular employee whose name has been entered on such a preferential list by an order of the Board retains his status. It does not matter that his reinstatement is conditioned upon the fact that employment becomes available. Various other conditions⁶³ have been imposed in reinstatement orders. Whatever these conditions may be, the irregular status of the employee conditionally ordered to be reinstated is not terminated by them.

All these cases have been classified as uncomplicated because they do not offer other difficulties than usually arise in deciding individual cases. There is no obscurity regarding the principles.

61. *NLRB v. Remington Rand, Inc. et al.*, 94 F. (2d) 862 (C. C. A. 2d, 1938); *cert. denied*, 304 U. S. 576, *rehearing denied* 304 U. S. 590; *NLRB v. Lightner Pub. Corp.*, 113 F. (2d) 621 (C. C. A. 7th, 1940).

62. *Smith Wood Products Inc.*, 7 NLRB 950 (1938); Third Annual Report of the NLRB 201 (1939); *F. W. Woolworth Co. v. NLRB*, 121 F. (2d) 658 (C. C. A. 2nd, 1941); *Union Drawn Steel Co. v. NLRB*, 109 F. (2d) 587 (C. C. A. 3d, 1940).

63. *Williams Motor Co.* 8 Lab. Rel. Rep. 413 (1941) (case of discontinuance of a department when the motive is anti-union). Since the employer is not required to reopen the department the Board placed the union members on a preferential list for employment in jobs for which they are qualified. In case of the closing of the plant, the Board terminated back-pay for the discharged at the time of the closing of the plant, but ordered reinstatement of the employees if the employer should in the future re-enter such business or any similar business. *Ray Nickols, Inc.*, 15 NLRB 846 (1939). In the "run away" plant situation the employer removes its plant in order to avoid bargaining with a union or paying union wages. The Board has never gone so far as to order the employer to move back again. It has, however, ordered that the employer either return to the original location or else pay moving and transportation expenses for union members and their families. *Schieber Millinery Co.*, 26 NLRB No. 99 (1940), *aff'd and modified* 116 F. (2d) 281 (C. C. A. 8th, 1940). In *re Klotz and Co.*, 13 NLRB 746, (1939) (order gave the employees the option of collecting moving expenses for their families or pay for bi-weekly transportation to visit their families back home.

2. The complicated cases are shrouded in much confusion with regard to basic issues. It is highly debated whether and to what extent the irregular employee status can be dissolved by unilateral action of the employer, *i.e.*, by discharge.⁶⁴ Two extreme views have been advanced concerning this problem. The one contends that the employer is completely free to dissolve the irregular employment relation, except if such a discharge would be solely or preponderantly motivated by the employer's intent to discriminate among the employees for union activity.⁶⁵ The other extreme leads to the view which denies to the employer the power to dissolve the employment relation, even upon the ground of unlawful conduct, when the misconduct is connected with or constitutes part of a union activity. Since this will occur in the majority of cases, when work stopped because of unfair labor practice or labor dispute, this theory virtually deprives the employer for all practical purposes of his right to discharge.⁶⁶ The majority of decisions steer a middle course. Such a course was inaugurated by the Supreme Court in *NLRB v. Fansteel Metallurgical Corp.*⁶⁷ They grant to the employer the right to discharge its employees for cause. The two main causes recognized by the decisions are breach of agreement⁶⁸ and misconduct of the employees. It is the second of these causes which entails many difficulties, because not every misconduct justifies the dissolution of the irregular employment relation.⁶⁹ A host of theories have emerged to ascertain the border line between cases of misconduct which permit the employer to end

64. Announcements regarding discharge have to be weighed very carefully. Board and Courts have considered an employer's announcement during a strike that, if the employees do not return to work, they are discharged, as merely a tactical measure to induce the employees to abandon the strike. *Stackpole Carbon Co.*, 6 NLRB 171, 197 (1938); *Sunshine Hosiery Mills*, 1 NLRB 664, 676 (1936). Hence a distinction must be made between the purported or tactical discharge to which recognition is refused and an effective discharge recognized by Board and Court.

65. The rights to hire and to discharge, when exercised for normal ends is held inviolable; but it may be used to impair the growth of labor organizations. The question whether the reason for a discharge is only a pretext rather than the motivating cause is held the 'sine qua non test' for a valid discharge. In concurring opinion of Stone J. in *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 264 (1939). See also Comment (1938) 32 *ILL. L. REV.* 568.

66. ROSENFARB, *op. cit. supra* note 18, at 559.

67. 306 U. S. 240, 252-259 (1939).

68. *NLRB v. The Sands Mfg. Co.*, 306 U. S. 332, 344 (1939); *Matter of N. Y. State Labor Relations Board v. McChesney*, 175 Misc. 95, 21 N. Y. S. (2d) 771 (1940).

69. "Discharges for law violations *per se* are not permissible, for the employer could then utilize every petty violation of an ordinance . . . as being an excuse . . . to discharge." ROSENFARB, *op. cit. supra* note 18, at 560. See Note (1939) 17 *N. C. L. REV.* 438, 442.

a status which came into existence either by his unfair labor practice or because of a labor dispute.⁷⁰

Of the utmost importance is the fact that the same reasons, or approximately the same reasons, which have been considered justifying discharge have been regarded also as limiting the Board's discretionary power to reinstate. Moreover valid discharge for cause and denial of reinstatement have practically the same effect. They both terminate the irregular employee status in its deteriorated phase by cancelling the employee relationship entirely. Nevertheless both ways are distinct in various regards. It is small wonder that this bifurcation of the way to the same end entails much ambiguity. A correct analysis of the differences between these two methods of terminating the irregular employee status will serve to clarify the issue.

IV. *Public and Private Law in Employment Relations*

The clue to such an analysis can be found in the majority opinion of the Supreme Court decision in *NLRB v. Fansteel Metallurgical Corp.*⁷¹ It recognized that the affirmative actions to be taken by the Board in order to effectuate the policies of the Act are not limited to the reinstatement of employees with or without back-pay which serve as mere examples of such actions. The discretion of the Board to require such affirmative actions has been considered—

"broad, but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes."⁷²

The ultimate policies of the Wagner Act are preservation and promotion of industrial peace which can be effectively secured through appropriate provisions of collective agreements.⁷³ Consistently employees who were found to have committed breaches of agreement not to strike were refused reinstatement.⁷⁴

The theory of the limitations of the discretionary power of the Board⁷⁵

70. The most contested theories center upon the problem whether and how far employees' misconduct or offenses are to be condoned, because such might be considered "provoked" by unfair labor of the employer. Note (1939) 39 COL. L. REV. 1369.

71. See note 67 *supra*.

72. *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257 (1939).

73. See Hoeniger, *Social Peace and National Defense* (1941) 16 THOUGHT 51, 55.

74. *NLRB v. Columbian Enameling & Stamping Co.*, 96 F. (2d) 948, 953 (C. C. A. 7th, 1938), 306 U. S. 292 (1939); *NLRB v. The Sands Mfg. Co.*, 306 U. S. 332, 334 (1939). See, however, dissent of Black J. concurred in by Frankfurter J.

75. "Notwithstanding the mandatory form of Sec. 10 (c) its provisions in substance leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in

explains why reinstatement was refused to employees whose conduct was found to be contrary to the aims of the Wagner Act.⁷⁶ With regard to the application of this theory it is of less importance or even irrelevant whether the employees guilty of such misconduct had been discharged⁷⁷ or not.⁷⁸ Such cases refer to misconduct of employees which is injurious to, or at least, disapproved by the employer. Another kind of misconduct may be harmful to fellow workers, and particularly to their efforts toward self-organization. Since self-organization for the purpose of collective bargaining is encouraged by the Wagner Act, the Board followed the principle, guiding as well as limiting its discretion, when it refused reinstatement to a discharged employee who offered to serve the employer as a labor spy.⁷⁹

In order to effectuate the policies of the Act the Board orders even strangers who never have been employees of this employer to be "instated", thus creating the quasi-employee status which has been discussed above.⁸⁰ Furthermore, the Supreme Court has approved the Board's position by ordering reinstatement or "instatement" of employees who, after they were discriminated against, have obtained equivalent employment elsewhere.⁸¹ In the case of unfair labor practice it remains no longer a decisive factor whether the worker injured by this unfair labor practice comes under the definition of an "employee" in Sec. 2 (3) of the NLRA. Moreover, the Board's discretionary power in

choosing the particular affirmative relief to be ordered, 11 NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 265 (1938). See also NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1, 47 (1937). Cf. NLRB v. Bradford Dyeing Ass'n, 106 F. (2d) 119, 124 (C. C. A. 1st, 1939); McNeely & Price Co. v. NLRB, 106 F. (2d) 878, 880 (C. C. A. 3d, 1939); Republic Steel Corp. v. NLRB, 107 F. (2d) 472, 479 (C. C. A. 3d, 1939); NLRB v. Elkland Leather Co., Inc., 6 Lab. Rel. Rep. 830 (1940) (reinstatement of strikers convicted of rioting during the strike caused by unfair labor practice); NLRB v. Fruehauf Trailer Co., 301 U. S. 49, 57 (1937). See NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240, 258 (1939) (the Supreme Court held that the Board had transcended the limits of its discretionary power in this particular instance.)

76. Nothing prevents the employer from discharging an employee whose reinstatement the Board refused to order and who had not been discharged before. Note (1939) 39 Cor. L. Rev. 1369.

77. As in NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939).

78. Note the refusal in the Fansteel case to reinstate the abettors of strike who never were discharged, where the court said: "If it be assumed that by virtue of Sec. 2 (3) they still had the status of 'employees,' that provision did not automatically provide reinstatement. Whether the Board could order it must turn on the application of the provision empowering the Board" to grant relief. NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240, 260 (1939).

79. Thompson Cabinet Co., 11 NLRB 1106, 1113 (1939).

80. See page 396 *supra*.

81. See page 397 *supra*.

applying the affirmative remedies is not excluded if the employee concerned has been discharged by the employer. Ex-employees as well as non-employees who are discriminated against may be ordered to be re-employed or "instated". The only supposition for the applicability of these remedies is unfair labor practice of the employer.

Unless the employer is guilty of unfair labor practice, the decision of the employer retains its full significance even so far as the irregular status of the employee out of work is concerned. In this case, however, the status is not remediable, and the NLRB has no jurisdiction with regard to Sec. 10 of Act concerning prevention of unfair labor practice.⁸² The irregular not remediable employee status can be *terminated by valid discharge for reason*. In this regard, it is of particular importance that the employer's interest to continue his business has to be taken into consideration. Hence the right to *replace strikers* obtains.⁸³ Replacement in such cases actually amounts to discharge. Discharge in turn is the way of terminating contractual employment relations which are based on the contract of hiring. Therefore, we may say: As long as there is no unfair labor practice, the irregular employee status remains in the sphere of contractual relations or *in the sphere of private law*. The fact that the irregular employee of the non-remediable type can only be discharged for reason,⁸⁴ may modify but does not basically alter or eliminate the contractual relationship founded upon private law.

This legal situation changes completely as soon as unfair labor practice enters the scene. Then the jurisdiction of the NLRB is established. Its power to prevent any person from engaging in unfair labor practices is exclusive. It can not be affected by any other means of adjustment which have been or may be established by agreements or otherwise.⁸⁵ The NLRB is a public administrative agency. The

82. See notes 15, 16 *supra*.

83. Ore Steamship Corp., 29 NLRB No. 137 (1941). The Board has gone very far in granting the employer the right to replace strikers. The union participated in a sit-down strike on shipboard and adopted a policy of preventing any of the employer's ships from sailing. The employer instructed the shipping masters to furnish a new crew which would not be likely to engage in a "sit-down strike." The sit-down strike was not motivated by any unfair labor practice of the employer. The Board found that its action in hiring a new crew, which was not likely to engage in a sit-down strike, was not motivated by the desire to discriminate against union members but was a matter of business expediency. The Board so holds, although this actually means selecting of non-union members. Business judgment, the Board declares, demanded that the management should thus guard against strikes. See also notes 56-60 *supra*.

84. The important fact may be emphasized again, that in these cases the reason for discharge may be based on the employer's interest. See notes 50, 83 *supra*.

85. NLRA § 10a, 29 U. S. C. A. § 160 (a). See NLRB v. Newark Morning Ledger Co.,

remedies provided by the NLRA for the prevention of engaging in unfair labor practice are of public law in character. Unfair labor practice when committed transforms the irregular employee status; it transforms this status from the spheres of private law to those of *public law*.

The public law nature of the remedial irregular status gives us the clue to the fact that in this case the usual means of terminating the employee status, such as discharge, are relegated into the background. Unfair labor practice is considered against the public interest and calls for remedies in order to effectuate the public policy of the Wagner Act. The question which arises in a given instance is: What remedies fit best to achieve this purpose? It is of less or no importance at all whether beneficiaries of these remedies may be ex-employees or non-employees. Only the effectuation of the policies of the Act count. As soon as unfair labor practice has occurred, we should stop to consider the consequences under the private law and contractual concept of discharge.⁸⁶ Thus we would place in correct focus the public law problems which center upon the application provided by the Wagner Act.⁸⁷

Serious problems as to the applicability of these affirmative remedies arise only in complicated cases. In such cases either misconduct of the employees concerned or other particular circumstances make it ques-

120 F. (2d) 262 (C. C. A. 3rd, 1941); *NLRB v. Hawk and Buck Co., Inc.*, 120 F. (2d) 903 (C. C. A. 5th, 1941).

86. "A misconception of the nature of the Board's process may arise from the fact that in the enforcement of the public right to have the channels of interstate commerce freed from obstructions resulting from unfair labor practices a private right of an employee may incidentally be protected or enforced. Even though private relief is thus afforded it nevertheless remains true that the Board's powers may be invoked only when there is a public right to be protected and that its processes are never available to a private suitor." *NLRB v. Newark Morning Ledger Co.*, 120 F. (2d) 262, 268 (C. C. A. 3rd, 1941).

87. "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences. . . ." H. R. REP. No. 972, 74th Cong., 1st Sess. (1941) 21. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265 (1940), where the court states "The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'." In *National Licorice Co. v. NLRB*, 309 U. S. 350, 362 the Court says: "The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. . . . It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act."

In *Phelps Dodge v. NLRB*, 313 U. S. 177, 193, 194 (1941) the court says: "The Board, we have held very recently, does not exist for the 'adjudication of private rights'; it 'acts in a public capacity.' . . . The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies."

tionable whether or to what extent these remedies are to be granted. Misconduct of the employees concerned or the other conditions were said to have deteriorated the remediable irregular employee status, *i.e.* lessened or even discarded the applicability of the remedies. There was seemingly a bifurcation of the way in which this deteriorated phase of the irregular status could be ended: discharge for cause or denial of the remedy. Now we have come to realize that as a consequence of unfair labor practice of the employer this kind of the irregular employee status is governed by public law. Therefore, we know that there is no room for applying private law methods such as discharge. Board and Courts recently have done their best to clarify that in these cases it has become irrelevant whether the employees concerned have been discharged or not.⁸⁸ There is actually *no bifurcation* of the way leading to the termination of this status. It can be terminated only by the public law methods of granting or denying the remedies provided by the Wagner Act. The problem remains to find out the principles which determine the boundary line of the Board's discretion to grant or refuse the affirmative remedies in question.

This problem has been approached with some success along the following line: the decisions of the Board ordering or refusing reinstatement, *etc.* are considered as equitable remedies.⁸⁹ Therefore, they will be denied to those who come to the Courts with unclean hands.⁹⁰ Their action is said to have raised an estoppel⁹¹ against the procurement of benefits under the NLRA which aims to free the employer-employee relationship from "interference and coercion from any source."⁹² In general it can be said: through violation of the law, or other misconduct, or finally through circumstances which come within their responsibilities the irregular employees may forfeit their privileged status and lose the protection⁹³ of public law which is involved in the remedies provided by the Wagner Act.

88. See note 87 *supra*.

89. Restoration to service is more or less the specific performance of a personal service contract. CLARK, *PRINCIPLES OF EQUITY* (1919), 62, 63, 78; Stone, *The "Mutuality" Rule in New York* (1916), 16 COL. L. REV. 443. See further, Note (1939) 48 YALE L. J. 1265.

90. Comment (1939) 37 MICH. L. REV. 1256, 1272; 38 COL. L. REV. 1507 (1938). But for a repudiation of the "clean hands" doctrine in proceedings for enforcement of the Board's reinstatement order: See *NLRB v. Carlisle Lumber Co.*, 99 F. (2d) 533, 540 (C. C. A. 9th, 1938).

91. *NLRB v. Columbian Enameling & Stamping Co.*, 96 F. (2d) 948, 953 (C. C. A. 7th, 1938); *Standard Lime & Stone Co. v. NLRB*, 97 F. (2d) 531, 535 (C. C. A. 4th, 1938).

92. ROSENFARB, *op. cit. supra*, note 18, at 561, 648-655.

93. See summary in the Fourth Annual Report of the NLRB 105 (1940), under the

The various theories discussed above which try to determine the criteria for justification of discharge present valuable principles. They, however, find their chief basis in the sphere of contractual relations, *i.e.* in the sphere of private law. Therefore, the ideas set forth in these theories may be applied only in an analogous way, until they are adapted to the public law foundation of the remedies clarified in recent decisions of the Supreme Court.

Conclusion

The decisive conclusion which we have arrived at is that the remediable irregular employee status is established by means of public law. The remedies are derived out of public law; they are administered by a public-administrative agency. Its orders are subject to the review of the courts only as to their arbitrariness, unreasonableness or caprice.⁹⁴

In antithesis to this conclusion we must recall our point of departure. We departed from the contract of hiring, *i.e.* doubtlessly from a private law aspect. We termed the employment relation based upon such a contract as regular as long as the employee concerned is actually at work. From this point of view the distinction whether the employment conditions were bargained collectively or individually has led only to subdivisions of this status.⁹⁵ The Wagner Act extends the employee status to those employees who are out of work because of a labor dispute or of unfair labor practice. We termed this status irregular.⁹⁶ We came, however, to realize the seemingly bewildering fact that this status includes also non-employees or ex-employees who are discriminated against. In these cases there was to be found no contract of hiring at all, or that if such a contract had existed it had definitely terminated. These cases remain perplexing only so long as we continue to comprehend them under the private law aspect of the contract of hiring. The apparent paradox disappears when it becomes clear that unfair labor practice creates a status for employees or prospective employees which is based on public law. *It is the paramount significance of unfair labor practice that it changes completely the importance of the private law relations derived from the contract of hiring.*

heading: Effect on Board Orders of Violent or Unlawful Conduct on the Part of Employees who were Discriminatorily discharged or who went on strikes in protest against Unfair Labor Practice.

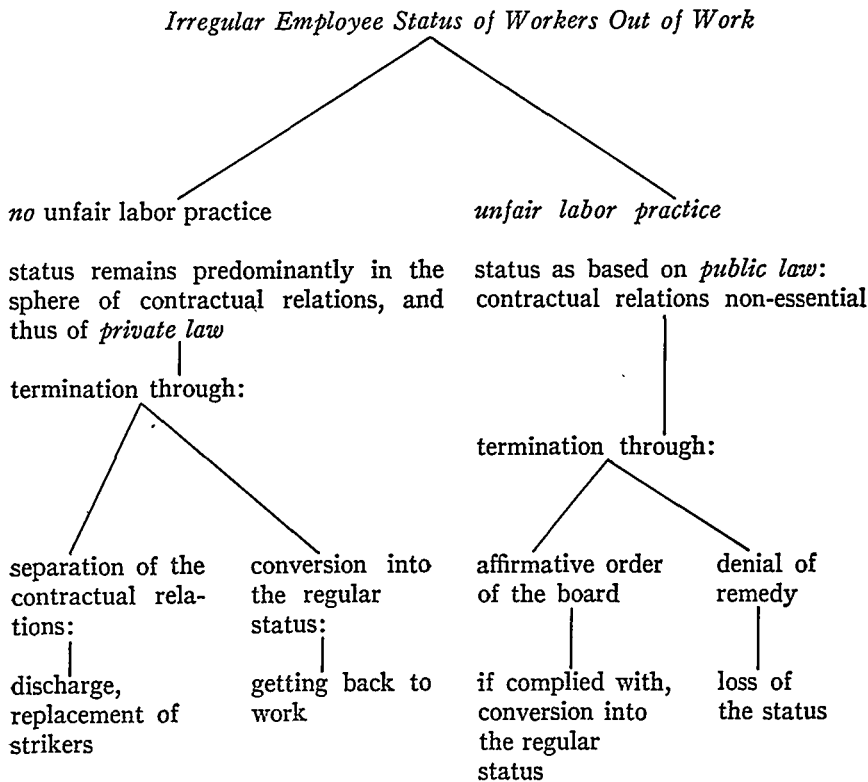
94. In *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 196 (1941) the Supreme court has emphasized the system of "restricted judicial review in relation to the wide discretionary authority which Congress has given the Board."

95. Hoeniger, *op. cit. supra* note 1, at 32.

96. Hoeniger, *op. cit. supra* note 1, at 34.

The individual contract of hiring under the Wagner Act becomes almost irrelevant or, at least, non essential as soon as unfair labor practice occurs. As long as the irregular employee status of those workers who are out of work because of a labor dispute does not involve unfair labor practice, the private law relations prevail. This status can be terminated by discharge for cause or by replacement of strikers. Unfair labor practice creates an irregular employee status *sui generis* based on public law. This status can be terminated only by granting or refusing the affirmative remedies against unfair labor practice.

In contradistinction to the subdivisions of the irregular status which we made above departing from the contract of hiring, the results of this tentative analysis can be summarized in another graph:



The negative statement, that the existence or continuation of an individual contract of hiring ceases to be a decisive factor in case of unfair labor practice of the employer, ought not to conclude this tentative

analysis of the individual employment contract under the Wagner Act. There is a positive complement to this negative result. The privileged protection of employees in the irregular status as a consequence of unfair labor practice is based on public law and entails, at least, *semi-public duties of the protected individuals as well as unions*.⁹⁷

This important corollary⁹⁸ of the privileges of labor has been discerned and perceived by an analysis of the bulk of precedents concerning the pertinent part of the NLRA. This searching inquiry was aimed not in the main at the clarification of some particulars, but rather at the finding out of some leading principles or the philosophy behind these particulars. Research guided by such an aim tends toward the goal of bringing about a *Jurisprudence of Industrial Relations*.⁹⁹

97. Not only the individual workers but also the unions are protected by statutory provisions of a public law nature. "The policy of these statutes can be justified because properly developed self-organizations invigorate collective bargaining. It has to be kept in mind that only a sound development of union is to be encouraged and protected. Unions which can become exclusive representatives of groups of employees, covering as their bargaining unit also non-union members, cease to be merely private associations. They assume a quasi-public character and must, therefore, take over quasi-public obligations. . . . In the long run, unions will continue to enjoy the privileged status of being protected and encouraged by law, even at the expense of some individual rights, if they conclusively demonstrate fulfillment of their quasi-public duties." Hoeniger, *Labor Law—An Instrument for Social Peace and Progress* (1940) FORDHAM UNIV. SOCIAL STUDIES 21-22.

98. If this corollary concerning the public duties and responsibilities were recognized and made a guiding principle in decisions, the often deplored one-sidedness of the Wagner Act would disappear. A well-founded *doctrine of the public duties* of labor which correspond to the privileges based on public law would certainly prove to be more effective than statutory provisions establishing unfair labor practice of employees in certain cases such as breach of contract, sit-down strike, etc. See Wisconsin Employment Peace Act. WIS. STAT. (1939) 111.06.

99. Jurisprudence of Industrial Relations has many patent ramifications. Collective agreements, because of the regulatory effect of their provisions, produce a bulk of labor law. Hoeniger, *op. cit. supra* note 1 at 35. By systematically surveying such provisions and prudently applying the method of generalization, important principles can be disclosed. Proceeding in such a way, Professor Sumner H. Slichter has recently announced the "*emergence of a system of Industrial Jurisprudence*." SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT* (1941) 1. Another branch of the Jurisprudence of Industrial Relations will certainly emerge if and when the bulk of cases and precedents resulting from the application of the statutes concerning industrial relations will have been surveyed and systematized in a similar way.

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The FORDHAM LAW REVIEW joins in respectful tribute to our late REGENT AND PROFESSOR OF JURISPRUDENCE, REVEREND JAMES A. CAHILL, S.J., PH.D., S.T.D. His inspiration, interest and enthusiasm were always at the service of the REVIEW. The memory of his sterling and independent spirit will long remain with us.
